Supreme Court, U.S.
FILED

96 545 OCT 7 1996

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

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DAVID L. SMITH,

Petitioner,

v.

MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Respondents.

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# PETITION FOR A WRIT OF CERTIORARI

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DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

48 pp

## QUESTIONS PRESENTED FOR REVIEW

Whether by issuing her orders imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, Judge Weinshienk, who is demonstrably biased, engaged in judicial misconduct which deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

Whether Mr. Smith was therefore entitled, as a matter of Fifth Amendment due process of law, to have his appeal of this judicial misconduct heard and decided by a fair and impartial court of appeals.

Whether because of its previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith, and its opinion dismissing for lack of jurisdiction the appeal of the orders issued by Judge Weinshienk imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, even though it had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291, 1292(a)(1) and 1651(a), and Fed. R. App. P. 21, the Tenth Circuit's fairness and impartiality might reasonably be questioned.

Whether the Tenth Circuit was therefore obligated to disqualify itself from the case pursuant to 28 U.S.C. § 455(a).

Whether by failing or refusing to disqualify itself from the case, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

Whether the Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Weinshienk, as to call for the exercise of the Supreme Court's power of supervision.

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DAVID L. SMITH,

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MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN,

Respondents.

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# PETITION FOR A WRIT OF CERTIORARI

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David L. Smith hereby files his petition for a writ of certiorari:

## OPINIONS BELOW

Order issued by the United States Court of Appeals for the Tenth Circuit on November 29, 1993 suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado.

Order issued by the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order.

Order issued by the Tenth Circuit on February 16, 1996 affirming the order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order.

Opinion issued by the Tenth Circuit on July 23, 1996 dismissing for lack of jurisdiction the appeal of the orders issued by United States District Judge Zita L. Weinshienk imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith.

Order issued by the Tenth Circuit on August 29, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 23, 1996) opinion.

## JURISDICTION

28 U.S.C. § 1254 is the statute believed to confer jurisdiction on the Supreme Court of the United States to review this case on certiorari.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

The Fifth Amendment to the Constitution of the United States provides:

> . . . [N]or shall any person be . . . deprived of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

## STATEMENT OF THE CASE

On November 29, 1993, the United States Court of Appeals for the Tenth Circuit issued its order suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado. See In re David L. Smith, 10 F.3d 723 (10th Cir. 1993), cert. denied, ____ U.S. ____, 115 S.Ct. 53, 130 L.Ed.2d 13, (1994). Mr. Smith may apply for readmission to the Tenth Circuit bar when he can

demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied. Id.

On February 13, 1996, the Tenth Circuit issued its order disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order. See In re: David L. Smith, 76 F.3d 335 (10th Cir. 1996). Mr. Smith's petition for a writ of certiorari contesting, on Fifth Amendment due process grounds, the validity of this disbarment order is currently pending in this Court.[1] See In re: David L. Smith, No. 96-212 (filed on August 6, 1996).

On February 16, 1996, the Tenth Circuit issued its order affirming the disciplinary order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order. Mr. Smith may apply for readmission to the District Court bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied. Mr. Smith's petition for a writ of certiorari contesting, on



[1]The Tenth Circuit disbarred Mr. Smith from the practice of law in the Tenth Circuit without giving him the evidentiary hearing required by Fed. R. App. P. 46.

Fifth Amendment due process grounds, the validity of the Tenth Circuit's (February 16, 1996) order is currently pending in this Court.[2] See IN THE MATTER OF DAVID L. SMITH, No. 96-244 (filed on August 13, 1996).

On July 23, 1996, the Tenth Circuit issued its opinion dismissing for lack of jurisdiction the appeal of the orders issued by United States District Judge Zita L. Weinshienk imposing attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, who raised and briefed the following issues on appeal:

> (1) Whether by participating (as a member of the recomposed District Court disciplinary panel) in the (February 2, 1995) decision to deny Mr. Smith's motion to continue the District Court disciplinary panel's (September 21, 1994) disciplinary order, including the provision of the order staying the Committee on Conduct's (December 8, 1993) suspension of Mr. Smith from the practice of law in the District Court,



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[2]The Tenth Circuit refused to reverse the District Court's (February 10, 1995) disciplinary order indefinitely suspending Mr. Smith from the practice of law in the District Court, which was issued on the basis of the Tenth Circuit's (November 29, 1993) order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit, even though the Tenth Circuit's (November 29, 1993) order was issued without giving Mr. Smith the evidentiary hearing required by Fed. R. App. 46.

nunc pro tunc to November 29, 1993, and in the decision to issue the (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending Mr. Smith from the practice of law in the District Court pursuant to D.C.COLO.LR 83.6P., Judge Weinshienk gave effect to a local rule which is unconstitutional on its face, and as applied to Mr. Smith in the District Court disciplinary action, and to Mr. Smith and his clients in pending and potential civil rights litigation, including Howard.

(2) Whether Judge Weinshienk gave effect to this unconstitutional local rule even though the procedure followed by the Tenth Circuit disciplinary panel was so lacking in notice or opportunity to be heard that it denied due process to Mr. Smith; even though imposition by the recomposed District Court disciplinary panel of the same discipline as that imposed by the Tenth Circuit disciplinary panel has resulted in grave injustice to Mr. Smith; even though the kind of misconduct (if any) established against Mr. Smith has been held by the District Court to warrant substantially less discipline; and even though Mr. Smith's attorney, Mr. Figa, has refused to represent him competently in connection with the Tenth Circuit and District Court disciplinary actions.

(3) Whether by issuing her (May 15, 1995 and July 21, 1995) orders in

Howard removing Mr. Smith as Ms. Howard's attorney and lifting the stay in Ms. Howard's civil rights case, Judge Weinshienk acted beyond the scope of the recomposed District Court disciplinary panel's (February 10, 1995) disciplinary order, which did not permit removal of Mr. Smith as attorney for his clients in pending civil rights litigation.

(4) Whether Ms. Howard and Mr. Smith were denied procedural due process of law by Judge Weinshienk's refusal to allow Mr. Smith to argue on their behalf before issuing her (May 15, 1995 and July 21, 1995) orders, which were issued without prior notice of the contemplated removal of Mr. Smith as Ms. Howard's attorney and without an opportunity to file a brief.

(5) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (September 7, 1995) order granting defendants' application for attorney fees and imposing attorney fee sanctions of $8,640.00 against Mr. Smith exclusively for filing and pursuing an appeal of her (June 17, 1994) order staying Ms. Howard's civil rights case "until final action is taken on the Committee on Conduct's recommendation concerning plaintiff's counsel's status," and vacating the jury trial scheduled to commence on August 1, 1994.

(6) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (September 7, 1995) order treating Ms. Howard's and Mr. Smith's motion to clarify status of legal representation, and notice of Ms. Howard's inability to comply with Judge Weinshienk's (July 21, 1995) amended minute order as a pro se motion for extension of time to secure new counsel, and granting the motion to September 22, 1995.

(7) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (September 7, 1995) order announcing that "[p]laintiff will be presumed to be handling this case pro se until new counsel enters an appearance," and that "this Court will no longer accept any papers which have been signed by Mr. Smith."

(8) Whether Judge Weinshienk grossly abused her discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by issuing her (September 7, 1995) order refusing to rule on Ms. Howard's and Mr. Smith's request for proper notice, an opportunity to file a brief and a hearing after the Tenth Circuit has disposed of their appeal in this case (including their petition for rehearing

and suggestion for rehearing en banc), and has issued its mandate pursuant to Fed. R. App. P. 41(a).

(9) Whether Judge Weinshienk was proceeding without or in excess of her jurisdiction when she issued her (May 15, 1995, July 21, 1995 and September 7, 1995) orders.

(10) Whether an attorney who is disbarred by a biased judge during the course of litigation is entitled to an immediate appeal and/or writ of mandamus or prohibition (i.e., whether Judge Weinshienk's orders are final appealable orders).

(11) Whether Judge Weinshienk's orders are also appealable under 28 U.S.C. §§ 1291 and/or 1292(a)(1).

The Tenth Circuit dismissed the appeal for lack of jurisdiction, even though it had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291, 1292(a)(1) and 1651(a), and Fed. R. App. P. 21.

**ARGUMENT**

By issuing her orders imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, Judge Weinshienk, who is demonstrably biased, engaged in judicial misconduct which deprived Mr. Smith of his liberty and property interests in his good name,

reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.[3] Mr. Smith was therefore entitled, as a matter of Fifth Amendment due process of law, to have his appeal of this judicial misconduct heard and decided by a fair and impartial court of appeals. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decisionmaker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). However, because of its previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith, and its opinion dismissing for lack of jurisdiction



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[3]The harsh and unjustified sanctions imposed against Mr. Smith by Judge Weinshienk were part of the alleged basis for suspending and disbarring Mr. Smith from the practice of law in the Tenth Circuit and in the District Court.

the appeal of the orders issued by Judge Weinshienk imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith, even though it had the authority to hear and decide the appeal pursuant to 28 U.S.C. §§ 1291, 1292(a)(1) and 1651(a), and Fed. R. App. P. 21, the Tenth Circuit's fairness and impartiality might reasonably be questioned. Id. The Tenth Circuit was therefore obligated to disqualify itself from the case pursuant to 28 U.S.C. § 455(a).

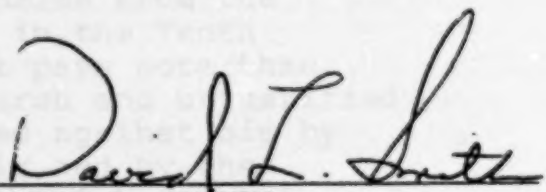
By failing or refusing to disqualify itself from the case, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. The Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Weinshienk, as to call for the exercise of the Supreme Court's power of supervision.

## V. CONCLUSION

Mr. Smith requests this Court to grant his petition for a writ of certiorari, and such other and further relief as may be just under the circumstances, including an order

declaring the orders imposing harsh and unjustified sanctions and discipline against him void ab initio.

Respectfully submitted,



DAVID L. SMITH

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PRO SE ATTORNEY-PETITIONER

**APPENDIX**

Order issued by the United States Court of Appeals for the Tenth Circuit on November 29, 1993 suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado . . . . . A-1

Order issued by the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order . . . . . A-4

Order issued by the Tenth Circuit on February 16, 1996 affirming the order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order . . . . . A-8

Opinion issued by the Tenth Circuit on July 23, 1996 dismissing for lack of jurisdiction the appeal of the orders issued by United States District Judge Zita L. Weinshienk imposing immediately payable attorney fees and costs of approximately $9,000.00, and other harsh and unjustified sanctions, against Mr. Smith . . . . . A-11

Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 5, 1996) of the Tenth Circuit's (July 23, 1996) opinion . A-22

Order issued by the Tenth Circuit on August 29, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 23, 1996) opinion . . . . . A-28

United States Court of Appeals
for the Tenth Circuit

| | | |
|---|---|---|
| | ) | [November 29, 1993] |
| In re: | ) | |
| | ) | No. 93-631 |
| David L. Smith | ) | |

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United

States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ___ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is

suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the Court
Per Curiam

United States Court of Appeals
for the Tenth Circuit

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|---|---|---|
| | ) | [February 13, 1996] |
| In re: | ) | |
| | ) | No. 93-631 |
| David L. Smith | ) | |
| | ) | |

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Order

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Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

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On December 14, 1995, this panel entered an order requiring respondent David L. Smith to show cause why he should not be disbarred for violating this court's November 1993 suspension order and for practicing in this court without authorization. On December 20, Mr. Smith filed his response. In ruling in this matter, the court has carefully reviewed that response, as well as the other pleadings filed to date in this disciplinary action. The court has determined that Mr. Smith's transgressions warrant disbarment.

Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was filing frivolous appeals and failing to pay court ordered sanctions. Following briefing and oral argument, this panel suspended Mr. Smith from practicing in the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct.

53 (1994). Approximately one year later, Mr. Smith filed a request for reinstatement. This panel denied that request. See Order Denying Reinstatement, No. 93-631, (10th Cir. July 18, 1995).

During the course of his suspension, Mr. Smith continued to file briefs in this court. In particular, the court has identified four appeals in which Mr. Smith appears to have drafted briefs on behalf of the allegedly pro se appellants. Those appeals are 94-1127, Qualls v. Regional Transportation District, 94-1130, Dunkin v. Louisiana-Pacific Corporation, 94-1317, Howard v. Mail-Well Envelope Company, and 95-1198, Seales v. Jefferson County School District R-1. The December 14 show cause order was the culmination of this court's efforts to have Mr. Smith explain his involvement in these appeals.

In his response, Mr. Smith readily admits, as he has before, that he wrote and submitted the briefs in this court following the issuance of our suspension order. He maintains, however, that those submissions are not in violation of this court's order because he signed two of the briefs in question and included footnotes admitting his involvement in the other two. He suggests that these admissions absolve him of any allegations of "ghost-writing." See Johnson v. Board of County Commrs., 868 F. Supp. 1226, 1231-32 (D. Colo. 1994)(discussing elements of ghost-writing). The argument follows that because he admits his assistance, he cannot be subject to discipline. Mr. Smith's arguments misperceive the nature of the problem.

Mr. Smith was advised, in very clear terms, that he no longer had permission to practice law in this court. He was told he could not act as an attorney for his clients or former clients. In writing and filing briefs on behalf of otherwise pro se litigants, he violated that order. This breach existed regardless of whether he signed the briefs or inserted footnotes. Following the suspension order, Mr. Smith was prohibited from helping his clients with their briefs.

Contrary to assertions made in the response, the court has been very careful to distinguish between efforts made on behalf of clients and Mr. Smith's right to appeal sanctions issues on his own behalf. The briefs in the four cases identified asked for relief which went far beyond Mr. Smith as an individual. In 94-1127, for example, the alleged "pro se" brief requests relief in the form of reversing the district court's dismissal of certain claims and remand for an expedited jury trial on the merits. The front cover of that brief asserts it is being submitted by Mr. Qualls, not David Smith. We find it disingenuous for Mr. Smith to urge that these briefs only contained arguments personal to him.

Despite repeated warnings, Mr. Smith has chosen not to heed the orders of this court. He is, therefore, disbarred. His name will be stricken from the list of attorneys allowed to practice in this court. In addition, in accordance with Fed. R. App. P. 35(b), Mr. Smith's suggestion for hearing en banc was circulated to all judges of the court in regular active service. No member of the panel or the court has requested a poll. Therefore, the suggestion for en banc

hearing is denied. The request for evidentiary hearing is likewise denied. Mr. Smith is referred to the office of the Circuit Executive to file any desired judicial misconduct complaint.

Entered for the Court

Per Curiam

United States Court of Appeals
for the Tenth Circuit

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| | | |
|---|---|---|
| | ) | [February 16, 1996] |
| | ) | |
| IN THE MATTER OF | ) | Nos. 95-1091 & |
| DAVID L. SMITH, | ) | 95-1119 |
| | ) | (D.C. No. 93-DP-28) |
| Attorney-Appellant. | ) | (D. Colo.) |
| | ) | |

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ORDER AND JUDGMENT[4]

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Before Tacha, Logan, and Kelly,
Circuit Judges

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After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.



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[4]This order and judgment is not binding precedent, except under the doctrine of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

This appeal is from an order of the three-judge disciplinary panel of the United States District Court for the District of Colorado. Appellant Smith appeals pro se on numerous grounds relating to his suspension from the practice of law before this court and before the United States District Court for the District of Colorado. Appellant raises numerous grounds for his appeal relating to the application of local rules of the district court, the denial of due process in the procedures of that court and this court, and various allegations relating to the proceedings that resulted in suspension from the practice of law before the district court and this court.

This disciplinary matter has a long history in this court and in the district court. In November of 1993, a three-judge disciplinary panel of this court issued an order suspending appellant from the practice of law before the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993) (per curiam), cert. denied, 115 S.Ct. 53 (1994). Following his suspension before the Tenth Circuit, the United States District Court for the District of Colorado conducted hearings, took evidence, and reviewed records related to the actions underlying the disciplinary proceedings. The arguments that Mr. Smith makes again on appeal are, in large measure, a renewed effort to bring before this court matters that were determined previously in the original disciplinary proceeding. Appellant further alleges on appeal that various district court judges from the United States District Court in Colorado have imposed unjust and harsh sanctions against him. Finally, appellant urges that his counsel Mr. Figa, who has withdrawn from this case, failed to

represent appellant competently in connection with all of the disciplinary actions. We find no merit in any of the arguments made on appeal. We approve the disciplinary order issued by the district court for substantially the reasons given in its post-hearing order. This court recently disbarred Mr. Smith for his failure to abide by previously entered orders. In re Smith, No. 93-631 (10th Cir. Feb. 13, 1996) (per curiam). Continued attempts by this appellant to further litigate matters already determined by this court or foreclosed by previous determinations could result in the imposition of sanctions. AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

| | | |
|---|---|---|
| | ) | [July 23, 1996] |
| LINDA C. HOWARD, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 95-1428 |
| | ) | |
| MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN, | ) | |
| | ) | |
| Defendants-Appellees, | ) | |
| | ) | |
| | ) | |
| | ) | |
| DAVID L. SMITH, | ) | |
| | ) | |
| Attorney-Appellant. | ) | |
| | ) | |

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 93-D-1895)

Submitted on the briefs:[5]

Linda C. Howard, pro se for Plaintiff-Appellant and David L. Smith, pro se, Denver, Colorado, for Attorney-Appellant.

Jeffrey T. Johnson, Brian M. Mumaugh of Holland & Hart, Denver, Colorado, for Defendants-Appellees Mail-Well Envelope Company, Butler Paper Company, and Georgia-Pacific Corporation and Attorneys for Defendant-Appellee Great Northern Nekoosa Employee Protection Plan; Randall A. Constantine and Amy L. Lloyd of Elrod and Thompson, Atlanta, Georgia, for Defendant-Appellee Great Northern Nekoosa Corporation Employee Protection Plan.

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Before ANDERSON, BRORBY AND HENRY, Circuit Judges

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BRORBY, Circuit Judge.

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Attorney David L. Smith brings this interlocutory appeal challenging the district court's order awarding appellees $8,640.00 in sanctions. For the reasons stated, we dismiss for lack of jurisdiction.



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[5]After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

I

This case is but the latest chapter of the continuing saga of attorney David L. Smith. In 1993, we issued an order to show cause why Mr. Smith should not be fined, disbarred, or otherwise disciplined for filing frivolous appeals. In re Smith, 10 F.3d 723, 724 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct. 53 (1994). During oral argument on the order to show cause, Mr. Smith admitted he had not paid any of the sanctions previously imposed on him by this court and by the district court. Id. We therefore suspended him from the practice of law before the Tenth Circuit until and unless he demonstrated he had paid all of the sanctions levied against him. Id. In December 1995, we issued a second order to show cause why Mr. Smith should not be disbarred for violating this court's 1993 suspension order by drafting briefs on behalf of allegedly pro se appellants in at least four cases: Qualls v. Regional Transportation Dist., No. 94-1127; Dunkin v. Louisiana-Pacific Corp., No. 94-1130; Howard v. Mail-Well Envelope Co., No. 94-1317; and Seales v. Jefferson County Sch. Dist. R-1, No. 95-1198. In re Smith, 76 F.3d 335 (10th Cir. 1996)(per curiam). Mr. Smith admitted he had written and submitted the briefs in question. Id. at 336. We therefore ordered Mr. Smith's name be stricken from the list of attorneys allowed to practice before the Tenth Circuit. Id. The United States Supreme Court has also disbarred Mr. Smith. In re Disbarment of David L. Smith, ____ U.S. ____, 116 S.Ct. 510 (1995).

After we initially suspended Mr. Smith from practicing before this court in 1993, see In re Smith, 10 F.3d 723, the Committee on Conduct of the United States District Court for the District of Colorado took up the question of whether Mr. Smith should also be suspended from practicing before that court. Pending final action by the Committee on Conduct, the district court stayed all proceedings in this case. See Howard v. Mail-Well Envelope Co. 164 F.R.D. 524, 525 (D. Colo. 1996). Both Ms. Howard and Mr. Smith appealed the stay order, but we dismissed their appeal for lack of jurisdiction. Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. Nov. 15, 1994); see Howard, 164 F.R.D. at 525. In our order, we referred appellees' motion for sanctions on appeal to a Tenth Circuit disciplinary panel. Id. The disciplinary panel granted appellees' motion, awarded double costs and attorney fees, and remanded the case to the district court to determine the amount of attorney fees to be awarded. Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. July 18, 1995). By an order dated September 7, 1995, the district court concluded $8,640.00 in attorney fees should be awarded to the appellees, to be paid exclusively by Mr. Smith. The district court also advised Ms. Howard that Mr. Smith had been suspended from practicing law before the United States District Court for the District of Colorado, see In re Smith, No. 95-1119, 1996 WL 67191 (10th Cir. Feb. 16, 1996) (affirming district court disciplinary panel's suspension order); Howard, 164 F.R.D. at 525 (noting Mr. Smith's disciplinary status has been resolved and that he is no longer authorized to practice in the United States District Court for the District of Colorado); that

the district court would no longer accept documents signed by Mr. Smith; that she should seek new counsel; and that until she hired an attorney she would be considered to be a pro se litigant.

Both Mr. Smith and Ms. Howard appealed the September 7, 1995 order asserting a litany of errors. A jurisdictional panel of this court dismissed Ms. Howard's claims, leaving Mr. Smith as the sole appellant. Howard v. Mail-Well Envelope Co., No. 95-1428 (10th Cir. Feb. 26, 1996). The jurisdictional panel also dismissed Mr. Smith's challenge to the district court's decision to terminate his representation of Ms. Howard and to no longer accept filings signed by Mr. Smith. Id.; see Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985)(order disqualifying counsel in a civil case is not immediately appealable); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992)(revocation of permission to appear pro hac vice in a criminal case is not immediately appealable). In addition, to the extent Mr. Smith challenges the propriety of the Tenth Circuit disciplinary panel's award of double costs and attorney fees as sanctions for filing a frivolous appeal, see Howard v. Mail-Well Envelope Co., No. 94-1317 (10th Cir. July 18, 1995), we are without power to grant relief. See In re Smith, 10 F.3d at 724 (a three-judge panel cannot overrule the prior decision of another three-judge panel of this court). Accordingly, the only issue properly before this panel is whether the district court's calculation of the appropriate dollar amount of sanctions in the September 7, 1995, order amounted to reversible error.

II

As a threshold matter, we must determine whether we have jurisdiction over this appeal in light of the fact that Ms. Howard's case is still pending in district court. In G.J.B. & Associates, Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990), we "join[ed] the majority of circuit courts that have addressed the issue and [held] that a sanction order against an attorney currently of record is not a final decision for purposes of a § 1291 appeal where the underlying controversy remains unresolved." We also held such an order is not appealable under the collateral-order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), G.J.B. & Assoc., 913 F.2d at 827-29, which the Supreme Court has recently explained "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." Digital Equip. Corp. v. Desktop Direct, Inc., ____ U.S. ____, ____, 114 S.Ct. 1992, 1995 (1994)(citations omitted); Stubblefield v. Windsor Capital Group, 74 F.3d 990, 997 (10th Cir. 1996). The crux of our decision regarding the collateral-order doctrine was that the attorney may challenge the sanction order as part of an appeal from the final judgment, even if the parties settle or decline to appeal, and therefore it is not effectively unreviewable absent an interlocutory appeal. See G.J.B. & Assocs., 913 F.2d at 829 ("We reject any notion that an attorney risks losing the right to appeal if the parties settle or elect not to appeal from the final judgment"); see also Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993) (attorneys have standing to appeal orders issued

directly against them, but lack standing to appeal orders applicable only to their clients). Similarly, in Dickstein, 971 F.2d 448, we held an order revoking defense attorney Jeffrey A. Dickstein's permission to appear pro hac vice due to improper conduct was not immediately appealable, because it did not amount to a "final decision[] of the district court[]" within the meaning of 28 U.S.C. § 1291. Id. at 448. Further, as in G.J.B. & Associates, we held the challenged order was not appealable under the collateral-order doctrine because it was not effectively unreviewable through an appeal from a final judgment in the underlying case. Id. at 451. We explained that the only right defense counsel sought to vindicate in his interlocutory appeal was his reputation, which could be just as effectively rehabilitated through an appeal from a final judgment as through an interlocutory appeal, and that he did not seek to vindicate his asserted interest in continuing to represent the defendant throughout the remainder of the proceedings in the district court. Id. Most recently, in Johnson v. Board of County Comm'rs, 85 F.3d 489 (10th Cir. 1996), we exercised jurisdiction over an appeal from an order disqualifying the attorney-appellant from representing one of the parties, even though the underlying controversy had been dismissed with prejudice pursuant to a settlement agreement. We explained our cases "establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation.

We have no difficulty concluding the order challenged in this case does not amount to a "final decision[] of the district[] court" within the meaning of 28 U.S.C. § 1291. See Stubblefield, 74 F.3d at 995-96 (a "final decision of the district court . . . 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment'")(quoting Digital Equip., ____ U.S. ____, 114 S.Ct. at 1995 (citation and internal quotation marks omitted)). Furthermore, in light of our decisions in G.J.B. & Associates, Dickstein, and Johnson, we also conclude we lack jurisdiction over Mr. Smith's interlocutory challenge to the district court's decision under the collateral-order doctrine for three reasons: First and foremost, we see no meaningful distinction between Mr. Smith's position and that of Mr. Dickstein. As in Dickstein, Mr. Smith no longer represents a party in the litigation, but faces the stigma of a ruling that reflects negatively on his competence and conduct. However, as was also the case in Dickstein, the decision Mr. Smith now challenges may be effectively reviewed in an appeal from a final judgment, even if the parties settle their dispute or otherwise elect not to appeal.

Second, we disagree with the rationales underlying the decisions of the Third, Fifth and Seventh Circuits holding a sanction order against an attorney who no longer represents a party in the litigation is appealable under the collateral-order doctrine. See Markwell v. County of Bexar, 878 F.2d 899 (5th Cir. 1989); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 537-39 (3d Cir. 1985); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 225-26

(7th Cir. 1984). The central thesis of these decisions is that attorneys who no longer represent parties in a case may be unable to challenge a sanction order by filing an appeal after a final judgment is entered for two reasons: first, their former clients might settle or elect not to appeal; and second, the attorney might not be notified that a final judgment has been entered given that he no longer actively participates in the litigation. Regarding the first rationale, our decisions in G.J.B. & Associates, Dickstein and Johnson make it clear an attorney may appeal a sanction or disqualification order even if his former client settles or does not appeal. Regarding the second rationale, we believe our sister circuits' analyses improperly blur the line between the impossibility of effective review necessary under the Cohen doctrine and mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal.

Third, our cases make it clear the mere fact the sanction order in this case is currently due in full does not give rise to the type of irreparable harm justifying review under the collateral-order doctrine. In declining to adopt a blanket rule that all sanctions are immediately appealable under Cohen, this court has held, in a unanimous en banc decision, that "[a]ttorneys and parties [must] be fully aware that they must bear the burden of sanctions to the conclusion of the case and appeal on the merits of the fully adjudicated case." D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443, 1446 (10th Cir. 1984)(en banc). We see no reason to create an exception to this general rule

and allow attorneys who no longer represent a party in the underlying case an immediate opportunity to relieve themselves of the consequences of their misconduct merely because those consequences are monetary, nor could such a holding be reconciled with our decision in G.J.B. & Assocs. We also see no reason to permit an immediate appeal under Cohen so that Mr. Smith can, without delay, attempt to somehow rehabilitate his reputation by persuading us to set aside the district court's decision. Mr. Smith's interest in promptly diminishing the stigma associated with the district court's decision is no greater than Mr. Dickstein's.

Finally, we see no basis for jurisdiction under 28 U.S.C. § 1292(a), because the challenged decision is not an injunction, or under the All Writs Statute, 28 U.S.C. § 1651, because Mr. Smith may secure adequate review through an appeal from the final judgment in the underlying case and because he has otherwise failed to make the showing required to obtain a remedy under that statute. See McNeil v. Guthrie, 945 F.2d 1163, 1165 (10th Cir. 1991)("In order to be entitled to mandamus relief, a petitioner must show a clear abuse of discretion or conduct which arbitrarily assumes and exercises authority contrary to that of the judiciary . . . Additionally, because mandamus is an extraordinary remedy, a petitioner must also show that he lacks an alternative for the relief he seeks and that his right to the writ is not in dispute"); Appeal of Licht & Semonoff, 796 F.2d 564, 573 (1st Cir. 1986)(writ of mandamus will not lie because sanction order may be reviewed on appeal from final judgment). Furthermore, the district court has not taken the steps necessary to invoke our

jurisdiction under 28 U.S.C. § 1292(b). Finally, even if we assume for the sake of discussion we would have jurisdiction if the district court had made an express finding there was "no just reason for delay" and directed entry of judgment against Mr. Smith pursuant to Fed. R. Civ. P. 54(b), which we consider to be a very great assumption indeed, the district court made no such express finding in this case.

Appeal DISMISSED. Petition for writ of mandamus or prohibition DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| LINDA C. HOWARD, | ) | |
| | ) | |
| Plaintiff-Appellant-Petitioner, | ) | |
| | ) | No. 95-1428 |
| v. | ) | (D.C. No. 93-D-1895) |
| | ) | (Dist. of Colo.) |
| MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN, | ) | |
| | ) | |
| Defendants-Appellees-Respondents, | ) | |
| | ) | |
| and, | ) | |
| | ) | |
| ZITA L. WEINSHIENK, United States District Judge, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |
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| | ) | |
| DAVID L. SMITH, | ) | |
| | ) | |
| Attorney-Appellant-Petitioner. | ) | |
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PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

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Linda C. Howard and David L. Smith hereby file their Petition for Rehearing and Suggestion for Rehearing En Banc:

## I. PETITION FOR REHEARING

On July 23, 1996, a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Anderson, Brorby and Henry, Circuit Judges) ("Disciplinary Panel II") issued its (published) opinion (copy attached hereto) dismissing for lack of jurisdiction Ms. Howard's and Mr. Smith's appeal of immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by United States District Judge Zita L. Weinshienk. These sanctions were imposed against Mr. Smith after another three-judge disciplinary panel of the Tenth Circuit (composed of Seymour, Chief Judge, Baldock and Brorby, Circuit Judges) ("Disciplinary Panel I") granted defendants-appellees' request for sanctions, imposed a sanction of double costs and attorney fees, and remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded."

In its (July 23, 1996) opinion, Disciplinary Panel II held that the immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by Judge Weinshienk were not immediately appealable under 28 U.S.C. §§ 1291, 1292(a), 1292(b), or 54(b), or under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). However, Disciplinary Panel II overlooked the fact that when Disciplinary Panel I granted defendants-appellees' request for sanctions and imposed

a sanction of double costs and attorney fees, jurisdiction over this matter was thereby vested in the Tenth Circuit. See Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971). This jurisdiction was not divested when Disciplinary Panel I remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded." Id. Under these circumstances, the Tenth Circuit retained jurisdiction over this matter, and Disciplinary Panel II erred by dismissing Ms. Howard's and Mr. Smith's appeal for lack of jurisdiction.

In its (July 23, 1996) opinion, Disciplinary Panel II also denied Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, but failed to give its reasons (if any) for the denial. However, Ms. Howard and Mr. Smith had an indisputable right to a writ of mandamus or prohibition under the Tenth Circuit's holding in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975). Therefore, in the absence of any reasons for denying Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, Disciplinary Panel II deprived them of their First and Fifth Amendment right to access to the Tenth Circuit to review the actions of the district court pursuant to 28 U.S.C. § 1651 and Fed. R. Civ. P. 21.

## III. SUGGESTION FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the

panel decision is contrary to the following decisions of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1528 (1949); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990); Petuskey v. Rampton, 431 F.2d 378 (10th Cir. 1970), cert. denied, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971); Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975).

I express a belief based on a reasoned and studied professional judgment that this case involves one or more questions of exceptional importance: (1) Whether the immediately payable attorney fee sanctions of $8,640.00 imposed against Mr. Smith by Judge Weinshienk were immediately appealable under 28 U.S.C. §§ 1291, 1292(a), 1292(b), or 54(b), or under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); (2) Whether Disciplinary Panel II overlooked the fact that when Disciplinary Panel I granted defendants-appellees' request for sanctions and imposed a sanction of double costs and attorney fees, jurisdiction over this matter was thereby vested in the Tenth Circuit; (3) Whether this jurisdiction was divested when Disciplinary Panel I remanded this matter to Judge Weinshienk "to determine the amount of attorney fees on appeal to be awarded";

(4) Whether the Tenth Circuit retained jurisdiction over this matter, and Disciplinary Panel II erred by dismissing Ms. Howard's and Mr. Smith's appeal for lack of jurisdiction; (5) Whether Ms. Howard and Mr. Smith had an indisputable right to a writ of mandamus or prohibition under the Tenth Circuit's holding in Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); (6) Whether in the absence of any reasons for denying Ms. Howard's and Mr. Smith's petition for a writ of mandamus or prohibition, Disciplinary Panel II deprived them of their First and Fifth Amendment right to access to the Tenth Circuit to review the actions of the district court pursuant to 28 U.S.C. § 1651 and Fed. R. Civ. P. 21.

Dated this 5th day of August, 1996.

Respectfully submitted,


| LINDA C. HOWARD | DAVID L. SMITH |
|---|---|
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| PLAINTIFF-APPELLANT-PETITIONER | ATTORNEY-APPELLANT-PETITIONER |

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 1996, true and correct copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc were placed in the United States mail, postage prepaid, addressed as follows:

Zita L. Weinshienk, United States
District Judge
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| LINDA C. HOWARD, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | No. 95-1428 |
| v. | ) | |
| | ) | |
| MAIL-WELL ENVELOPE COMPANY, BUTLER PAPER COMPANY, GEORGIA-PACIFIC CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION EMPLOYEE PROTECTION PLAN, | ) | |
| | ) | |
| Defendants-Appellees, | ) | |
| | ) | |
| | ) | |
| | ) | |
| DAVID L. SMITH, | ) | |
| | ) | |
| Attorney-Appellant. | ) | |

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ORDER
Entered August 29, 1996

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Before ANDERSON, BRORBY, AND HENRY,
Circuit Judges

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This matter comes on for consideration of attorney-appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: _____

Deputy Clerk